Supreme Court, U.S.
FILED
NOV 12 1993
OFFICE OF THE CLERK

No. 93-646

In The

Supreme Court of the United States

October Term, 1993

SEABOURN S. LIVINGSTONE,
Petitioner/Cross-Respondent,
v.
PATRICIA A. DONAHEY,
Plaintiff/Respondent,
and
RICHARD M. DONAHEY,
Plaintiff/Respondent/Cross-Petitioner,
and
HELEN L. BOGLE,
Third Party Plaintiff/Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Sixth Circuit

PETITIONER/CROSS-RESPONDENT SEABOURN S. LIVINGSTONE'S

BRIEF IN OPPOSITION

TO CROSS-PETITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHERE A LAND OWNER KNOWS THAT THE PROPERTY HE IS PURCHASING CONTAINS AN INDUSTRIAL DUMP AT WHICH LIQUID AND SOLID WASTES HAVE BEEN DISPOSED, BUT FAILS TO INVESTIGATE TO DETERMINE IF THE PROPERTY HAS BEEN CONTAMINATED WITH HAZARDOUS SUBSTANCES, DOES HIS HIRING OF AN "ENVIRONMENTAL EXPERT" FOUR YEARS LATER AND FAILING TO COMPLY WITH THE EXPERT'S RECOMMENDATIONS CONSTITUTE "DUE CARE" FOR PURPOSES OF 42 U.S.C. 9607(B)(3)?

II.

DOES A LAND CONTRACT VENDOR'S SPECIFIC REMEDY INCLUDE THE RIGHT TO FORCE TITLE ON AN UNWILLING LAND CONTRACT VENDEE?

LIST OF PARTIES

The parties to the proceeding are as stated in the Petition and Cross-Petition to this Court.

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JURISDICTION

Petitioner/Cross-Respondent agrees that the jurisdiction of this Court has been properly invoked pursuant to Rule 12.3 of the Supreme Court Rules, 28 U.S.C. 1254(1) and 28 U.S.C. 1651.

STATUTES INVOLVED

Petitioner/Cross-Respondent agrees with Cross-Petitioners' citations to the statute involved in connection with Cross-Petitioners' Cross-Petition.

CONCISE STATEMENT OF THE CASE

Livingstone opposes the Cross-Petition with respect to the issue whether Richard Donahey may avail himself

of CERCLA's "third party" defense as provided in 42 U.S.C. 9607(b)(3). Donahey's Cross-Petition is premised upon a gross distortion of the facts as found by lower court rather than upon the record as a whole. The facts below, which were omitted from the Cross-Petition, are pertinent to whether review should be granted as to the latter issue.

Cross-Respondent Livingstone does not contest the statement of the case presented by Cross-Petitioners with respect to Issue II of the Cross-Petition, the Land Contract Vendor's Specific Performance Remedy, at page 7 of the Cross-Petition. Livingstone has no interest in the Cross-petition with respect to the land contract issue, as the resolution of that question does not affect his liability or the issues for which he seeks review by this Court.

Facts

In the fall of 1981, Richard Donahey expressed interest in purchasing the property at issue in this case. He inspected the property and charted an area on it which had been used as a dump. He was at that time "familiar with the risk of environmental liability posed by the maintenance and use of industrial realty," because of his liability for some PCB contamination of land owned by his closely held corporation. Trial Court Memorandum Opinion and Order, Petition, at A18-A19. Donahey's attorney sent a letter to Bogle, the owner of the property, expressing concern over the presence of a dump.

On January 1, 1982, Donahey entered into an "Agreement to Clean Up Dump" with St. Clair Rubber Company, the former tenant of the property. Donahey acknowledged in the agreement that the property had been used by St. Clair as a dumping site for both liquid and solid, possibly toxic, waste materials. *Id.*, at A19;

Trial Exhibit 6. Despite his awareness that the property had been used as an industrial dump, that it might be environmentally defective, that it might result in litigation and that its condition might be in violation of state and federal laws, Donahey signed the land contract on the same day he signed the Agreement — January 1, 1982. Trial Court Memorandum, Petition, at A19.

The Agreement to Clean Up Dump required St. Clair to complete its clean up of the property by June 30, 1982. Although St. Clair never performed this clean up, the Donaheys did nothing to enforce the Agreement. Donahey, R. 208 at 171. St. Clair ceased operations some time in 1982. Trial Court Memorandum, Petition, at A20.

In late 1985, a local newspaper reported that there had been some dumping of hazardous waste on the property. *Id.*, at A20. The Donaheys did not hire an environmental consultant until after April 1986, when the Michigan Department of Natural Resources (MDNR) sent the Donaheys, among others, letters informing them that the property was listed as a site of environmental contamination due to alleged solvent and adhesive dumping in the lagoons on site. The letters also designated them potentially responsible parties and requested the performance of a hydrogeological investigation. *Id.*, at A20; Donahey, R. 207 at 8-11; Trial Exhibit 18. The Donaheys did not comply with these requests. Donahey, R. 208 at 22-23.

Only in the spring of 1986, fully four years after they purchased the property, did the Donaheys hire their environmental expert, Lawrence Halfen, "to supply technical assistance in determining their course of action." Trial Court Memorandum, Petition, at A20-A21. They did not supply him, however, with the letters they had received from the MDNR. Halfen, R.209 at 86. Halfen inspected the property in June, 1986 and again in August, 1986, Trial Court Memorandum, Petition, at A21. Halfen later (in August, 1986) accompanied employees

of an environmental consulting firm, Environmental Engineering (E&E), which was directed by the Environmental Protection Agency to assess the site for potential inclusion on the Superfund list. After E&E issued its report, which identified several hazardous materials in samples taken from the property, Halfen submitted a clean-up proposal with a cost estimate of $30,000-$35,000. *Id.*, at A22.

Halfen's attempt to clean up the property in late August 1987 proved beyond any doubt that the environmental contamination consisted of more than the rubbish heaps, rubber deposits and rusted out 55 gallon drums visible to the eye on the surface of the property, as detailed in the trial court's Memorandum, Petition, at A23-A24. The trial court found, and the Sixth Circuit affirmed the finding, that Halfen's efforts exacerbated rather than remediated the environmental problems on the property. *Id.*, at A43-A44; *Donahey* v. *Bogle*, 987 F.2d 1250 (6th Cir. 1993), Petition, at A9 and A11. Halfen informed the MDNR of his discovery and the actions he took after completing his activities on the property. He subsequently proposed further clean up measures at an estimated cost of over $440,000, which the Donaheys did not do. *Id.*, at A4; Trial Court Memorandum, Petition, at A25.

The Donaheys abandoned the property in 1990 after their unsuccessful attempt to quitclaim it to Bogle. *Id.*, at A26. No cleanup plan has ever been submitted to the MDNR, and the site has never been remediated. Donahey, R. 207 at 28.

Based on "all relevant facts and circumstances," the trial court held that because Richard Donahey failed to use due care and failed to guard against foreseeable consequences, the third party defense under 42 U.S.C. 9607(b)(3) was not available to him. Trial Court Memorandum, Petition, at A44. The Sixth Circuit affirmed. Petition, at A8-A9, A11.

REASONS FOR DENYING THE WRIT

I.

DUE CARE ISSUE

The Cross-Petition seeking review of the Sixth Circuit's holding that Donahey did not exercise "due care" (as required to qualify for CERCLA's third-party defense, 42 U.S.C. 9607(b)(3)) should be denied. Donahey argues that reasonable reliance on the advice of an expert constitutes "due care". However appealing that issue sounds on a theoretical basis, it is not present under the facts of this case, and therefore would not properly be before this Court if certiorari were granted. Supreme Court Rule 15.1. Furthermore, the issue is not an important question of federal law which should be settled by this Court, nor is the Sixth Circuit's decision on the issue one which conflicts with any decision of this Court or another appellate court. Supreme Court Rule 10.

A. Whether Reliance Upon The Advice Of An Expert Constitutes "Due Care" As Required By 42 U.S.C. 9607(B)(3) Is Not Presented By The Facts Of This Case.

Donahey argues that this Court should determine that landowner's reasonable reliance on expert advice constitutes "due care" for purposes of CERCLA's third party defense. This argument, however, is premised on a mischaracterization of the facts and of the basis for the decisions of the courts below on this issue. Donahey's third party defense was unsuccessful not because Halfen's "remediation" was inadequate but because Donahey had become liable under CERCLA years before he first contacted Halfen.

42 U.S.C. 9607(b)(3) provides a defense against liability for (1) landowners who acquire property without

knowing of any contamination at the site and without reason to know of any contamination; and (2) owners of property ("clean" at time of purchase) which later is contaminated by the acts of third persons. The critical determination for finding the defense available to a land owner is that the land owner, whenever he or she learns of the release, must act with reasonable care. H.R.Conf.Rep. No. 962, 99th Congress, 2d Sess. 186-87, *reprinted in* 1986 U.S. Code Cong. & Admin.News 2835, 3279-80. In the case of a person claiming to be an innocent purchaser of contaminated land, the duty to inquire is to be judged as of the time of acquisition, and the provisions of 42 U.S.C. 9601(35)(B) as to "reason to know" govern the purchaser's responsibility with regard to acts of third parties prior to purchase. *Id.*

Richard Donahey clearly does not qualify as an innocent land purchaser. He purchased the property knowing of the existence of the dump; he knew that industrial wastes, both liquid and solid, had been disposed of there; and he knew that there was a risk of liability, litigation and the existence of federal and state law violations. He chose not to investigate the risk or the extent of the environmental hazard on the property, and, despite his awareness of the problems, purchased the property. Under these circumstances, for Donahey to claim (as he does at pages 4-5, footnote 1 of the Cross-Petition) that he had no idea that there might be contaminants *under* the dump is ludicrous at best and frivolous at worst.

Donahey states in his Cross-Petition that the trial and appellate courts "did not directly address or decide the 'due care' question here presented." Cross-Petition, at 6. The courts below did not address Donahey's argument that his hiring of an environmental expert insulated him from liability because the question does not even arise

under the facts in this case: Donahey acted with total disregard and in defiance of the environmental risks presented by the property long before Dr. Halfen appeared upon the scene.

Moreover, even if Donahey had purchased the land without knowing and without reason to know of the contamination, his actions subsequent to purchase by no stretch of the imagination constitute the "due care" required by 42 U.S.C. 9607(b)(3). Although notified by the MDNR that the site was listed as a contaminated site requiring investigation and remedial action, under CERCLA and under Michigan's Environmental Response Act (the state law equivalent of CERCLA), Donahey failed to comply with MDNR requests to investigate the property. He failed to inform his own environmental expert — hired over four years after Donahey learned of the dump and the potential contamination by hazardous materials — of the MDNR's letters, and never performed the final clean up of the property as recommended by that expert.[1]

This is not a case where a prospective purchaser relied, prior to purchase, on an expert's erroneous opinion that the property was not contaminated. Nor is it a case where a land owner discovered that land was contaminated after the purchase and then acted pursuant to an expert's advice as to how to remedy the release. Perhaps these cases will arise in the future and

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[1] **Donahey cites H.R. 96-1016, 96th Cong. 2d Sess., reprinted in 5 U.S. Code Cong. & Admin. News at 6119, 6136 and 6137, as support for his position that he exercised due care by hiring Dr. Halfen. *See*, Cross-Petition at 10-11, 3a-4a. In fact, that portion of the legislative history requires a person to exercise due care in the instruction of the contractor, to provide the contractor with adequate information and to take all precautions with respect to the particular waste that a reasonable person would take — all of which Donahey failed to do.**

the issue whether reliance upon expert advice constitutes due care should and will be addressed by this Court. What is certain, however, is that that question is not presented here. This Court, therefore, should deny certiorari on Issue I of the Cross-Petition.

B. The Issue Whether Reasonable Reliance Upon The Advice Of An Expert Constitutes Due Care Is Not Important And Review By This Court Of The Issue Is Not Necessary.

Donahey claims that the due care issue in this case is important because the situation presented by the Cross-Petition is "universal" and involves every owner of contaminated property. The issue presented (even as stated by Donahey) is not, however, what constitutes due care generally, but whether a landowner's reliance upon an expert hired by his attorneys constitutes "due care" for the purposes of the third party defense under 42 U.S.C. 9607(b)(3). This is, as the absence of case law involving the issue demonstrates, a much more unusual situation than that which faces "every owner" of contaminated property.

Donahey's assertion of the importance of the due care issue, therefore, is unsupported. Donahey cites no cases in which the issue has indeed arisen, and points to no conflict among the Federal Courts of Appeals or even among the Federal District Courts. This absence of case law indicates that the issue is neither important nor universal, as it appears not to have been pursued at all until this case.

II.

LAND CONTRACT ISSUE

Cross-Respondent Livingstone, as stated above, takes no position on whether this Court should grant certiorari on the land contract issue described at pages 7-8 and 12-13 of the Cross-Petition.

CONCLUSION

Whether or not certiorari is granted on the Petition in this case, Livingstone respectfully requests that this Court deny the Cross-Petition for Writ of Certiorari as to Issue I.

Respectfully submitted,

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Dated: November 10, 1993